

EXHIBIT 5

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ORACLE AMERICA, INC.

Plaintiff,

vs.

Case No. 3:10-cv-03561-WHA

GOOGLE, INC.,

Defendant.

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY
PURSUANT TO THE PROTECTIVE ORDER

VIDEO DEPOSITION OF GREGORY K. LEONARD, Ph.D.

San Francisco, California

Friday, March 11, 2016

Volume I

REPORTED BY:

REBECCA L. ROMANO, RPR, CSR No. 12546

JOB NO. 2241706

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Case No. 3:10-cv-03561-WHA

GOOGLE, INC.,

Defendant.

DEPOSITION OF GREGORY K. LEONARD, Ph.D.,
taken on behalf of the Plaintiff, at
405 Howard Street, 10th Floor, San Francisco,
California, commencing at 9:14 a.m., Friday,
March 11, 2016, before Rebecca L. Romano,
Certified Shorthand Reporter No. 12546

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1 San Francisco, California; Friday, March 11, 2016

2 9:14 a.m.

3 ---o0o---

4
5 THE VIDEOGRAPHER: Good morning. We are
6 on the record at 9:14 a.m., on March 11th, 2016.

7 This is the video-recorded deposition of

8 Dr. Gregory Leonard. My name is the

9 Brandon Miller, here with court reporter,

10 Rebecca Romano. We are here from

11 Veritext Legal Solutions.

12 This deposition is being held at

13 405 Howard Street, Tenth Floor,

14 San Francisco, California. The caption of this

15 case is Oracle America, Incorporated, versus

16 Google, Incorporated; Case No. C:10-03561-WHA.

17 Please note that audio and video
18 recording will take place unless all parties agree
19 to go off record. Microphones are sensitive, and
20 may pick up whispers, private conversations, and
21 cellular interference.

22 I am not related to any party in this
23 action, nor am I financially interested in the
24 outcome in any way.

25 At this time will attorneys introduce

1 themselves.

2 MS. HURST: Good morning. My name is
3 Annette Hurst, from Orrick, for Oracle America.
4 With me this morning are my colleagues, Andrew Kim;
5 Ayanna Lewis-Griss; Robert Keele; Alyssa Caridis;
6 Hannah Junkerman; and from Ocean Tomo,
7 Robert McSorley.

8 MR. COOPER: I'm John Cooper. I'm with
9 Farella Braun + Martel. I represent
10 Dr. James Kearl, who is Judge Alsup's Rule 706
11 expert, and Dr. Kearl is here with me.

12 MR. PURCELL: I'm Dan Purcell from
13 Keker & Van Nest, representing Google.

14 THE VIDEOGRAPHER: Thank you.

15 You may now swear in the witness.

16 THE REPORTER: If you could raise your right
17 hand for me, please.

18 THE DEPONENT: (Complies.)

19 THE REPORTER: You do solemnly state,
20 under penalty of perjury, that the testimony you
21 are about to give in this deposition shall be the
22 truth, the whole truth and nothing but the truth?

23 THE DEPONENT: I do.

24

25 /////

1 know, represent more than their actual lost
2 profits.

3 Because, No. 1, you know, Android would
4 have existed in some form with -- in the
5 but-for world, which really meant a lot of that loss
6 would have happened anyway.

7 Apple would have -- or iPhone would have
8 been bigger, and so it's -- it would have captured
9 some of that anyway.

10 And then plus just this idea that, you
11 know, I mean, the forecast obviously doesn't take
12 into account anything that was known as of when the
13 forecast was made.

14 I mean, sorry, it doesn't take into
15 account things that would happen in the future that
16 were unknown as of 2008. But there were a lot of
17 things that happened, such as, you know, the iPhone
18 actually did a lot better than people were
19 predicting. There was a financial crisis of 2008,
20 2009.

21 So it just -- it just seems to me that
22 all those reasons are -- really undercut the
23 approach that -- that he used.

24 Does that -- is that an answer to the
25 question?

1 Q. Yeah.

2 Oracle's experts argue that Java ME has
3 been directly displaced in many uses by Android.
4 And setting that aside was a potential bridge to
5 the smartphone and tablet areas.

6 My question is, what economic evidence or
7 analysis or principles suggest to you that neither
8 of these makes sense?

9 A. Could I ask you to repeat it just so I
10 have it in mind again.

11 Q. Let me ask the reporter to read it back.

12 A. Oh, sure.

13 (Record read as follows:

14 "QUESTION: Oracle's experts argue
15 that Java ME has been directly
16 displaced in many uses by Android.
17 And setting that aside was a
18 potential bridge to the smartphone
19 and tablet areas.

20 "My question is, what economic
21 evidence or analysis or principles
22 suggest to you that neither of these
23 makes sense?")

24 MS. HURST: And I'm just going to object
25 to the extent that's beyond anything disclosed in

1 the reports.

2 THE DEPONENT: So I think the two things,
3 if I understood it, was, one that just a
4 displacement of Java ME -- and I mean, I think
5 there, the issue is, again, what would -- you know,
6 what would the but-for world really have looked
7 like?

8 In my view, Android would have existed in
9 some form. If Android is going to be very
10 important to Google, it would have existed in -- in
11 some form, and -- and, therefore, a lot of the
12 displacement would have happened anyway.

13 And even if Android wasn't there, you
14 know, again, the world was moving to smartphones.
15 Java ME was really a -- was used on feature phones.
16 It just wouldn't be able to compete with the iPhone
17 or whatever other smartphones were out there, and
18 as a consequence, again, it was going to decline.

19 So in terms of the displacement, I think
20 the displacement would have happened in the but-for
21 world, and thus, the alleged infringement is not
22 causal of that.

23 So that's, I guess, the first thing.

24 The second thing is I think -- are you
25 asking would Java ME have been a bridge to some

1 sort of smartphone presence for --

2 Q. (By Mr. Cooper) Yes.

3 A. -- Sun?

4 Okay. Well, I think there we've got the
5 fact that Sun was -- had plenty of opportunities
6 to -- to do that. And they -- you know, and I go
7 through this in my report.

8 And they just, you know, failed. They
9 acquired Savage. You know, they weren't able to do
10 anything with it successfully. There's a lot of
11 testimony about that which I go through in my
12 report.

13 So I just don't see that -- and, again,
14 Java ME, it's not like it can be used in a
15 smartphone. So it's not like there was a --
16 Android blocked that, because it was just never
17 going to happen.

18 So -- and so I don't see how it would
19 have been a bridge to anything.

20 To really compete, they would have had to
21 have had a complete mobile stack. And, again, they
22 tried that with Savage and other things and were
23 just never successful.

24 So from my point of view, that's what is
25 really -- leads me to conclude, on the second

1 point, that it wasn't going to be a bridge to
2 anything.

3 Q. Dr. Leonard, please refer to
4 paragraph 209.

5 A. Okay.

6 Q. In that paragraph you cite reasons why
7 Java ME forecasts were too optimistic.

8 What economic evidence or analysis or
9 principles do you suggest -- or suggest to you that
10 this is the case?

11 A. Okay. Well, so if you -- for instance,
12 if you'll look at forecasts about iPhone sales as
13 of the same time, they substantially understated
14 what iPhones sales ended up being.

15 So since iPhones are displacing -- you
16 know, along with other smartphones, are displacing
17 feature phones, that suggests that the forecasts of
18 feature phones, basically, sales that -- or
19 licensing that Sun had made were almost certainly
20 too optimistic.

21 Because, you know, iPhone turned out to
22 do better than they -- than anyone had thought,
23 and, therefore, they were going to necessarily do
24 worse, I think.

25 Secondly, I think we -- I talk about the

1 2008 financial crisis that -- again, that was not
2 anticipated at the time they did the forecast.
3 But, you know, I mean, these -- these products do
4 have an income elasticity demand, so you would
5 expect then that actual sales would have been
6 affected by that relative to the -- relative to the
7 forecasts.

8 Let's see. Let me see if there's
9 anything else.

10 I mean, I think the -- the -- I don't
11 think that this was really anticipated either, is
12 that, you know, as I mentioned, if you look at the
13 amount of licensing they were doing per feature
14 phone, so just, you know, just not worrying about
15 whether they lost revenues because of feature phone
16 losses, but just conditioning on the number of
17 feature phones and asking how they were doing per
18 feature phone, that dropped off a lot.

19 I don't think that they anticipated that.
20 And -- but -- and yet it really can't be attributed
21 to -- to Android or smartphones because, you know,
22 Android is not used on feature phones.

23 So I think -- I'm not sure what caused
24 that exactly, except I suspect it has to do with,
25 you know, the fact that -- that Java ME was -- you

1 know, the platform was increasingly stagnant and
2 just was less and less attractive over time.

3 And it doesn't seem to me that they took
4 that into account -- well, or that it happened, you
5 know, more rapidly than they were anticipating when
6 they formed those forecasts.

7 Q. Now, Dr. Leonard, in paragraph 209, you
8 state the principle or the opinion that the proper
9 way -- and I'm at the top of page 101.

10 You say, "The proper way to calculate
11 lost profit damages is to look at what actually
12 happened, not what was forecasted to happen, and
13 is" -- "and to isolate the effect, if any, that the
14 alleged infringement actually had on Oracle's
15 Java ME."

16 Now, my question is, does this mean that
17 it's your opinion that a but-for world approach is
18 economically inappropriate for lost profit
19 determinations -- determination?

20 A. No. I think I'm something else entirely.
21 I'm saying to come up with the
22 but-for world, you start with the actual world and
23 then undo the effect of the infringement.

24 When you do that, you account for every
25 other factor that occurred in the actual world

1 I, Rebecca L. Romano, a Certified Shorthand
2 Reporter of the State of California, do hereby certify:

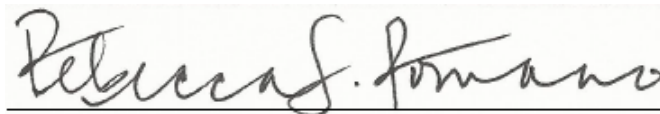
3 That the foregoing proceedings were taken before me
4 at the time and place herein set forth; that any
5 witnesses in the foregoing proceedings, prior to
6 testifying, were administered an oath; that a record of
7 the proceedings was made by me using machine shorthand
8 which was thereafter transcribed under my direction;
9 that the foregoing transcript is true record of the
10 testimony given.

11 Further, that if the foregoing pertains to the
12 original transcript of a deposition in a Federal Case,
13 before completion of the proceedings, review of the
14 transcript [] was [X] was not requested.

15 I further certify I am neither financially
16 interested in the action nor a relative or employee of
17 any attorney or any party to this action.

18 IN WITNESS WHEREOF, I have this date subscribed my
19 name.

20
21 Dated: March 14, 2016

22
23 

24 Rebecca L. Romano, RPR,
25 CSR. No 12546